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tion to the Board and was designed only to limit the certification to post-December 31, 1939 costs.[4]

2. Although, as it relates to the statutory authority of the Board, it is quite immaterial whether there are any real differences between partial certificates where the proposed facilities would have a greater capacity than was needed or would be used only partially for defense production, and partial certificates where the proposed facilities would have a clear post-war use (for the statute no more prohibits the latter than it does the former), we believe that the taxpayer is mistaken in contending that there is any real distinction between the two situations.

The Board, it will be noted, treated all the situations in which partial certificates would be issued as

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[4] The issuance of a partial certificate for an indivisible emergency facility, which as we contend was authorized under Section 124 (f), may be contrasted with the situation where only a part of divisible property has been certified as being necessary in the interest of the national defense. In the latter situation, the "emergency facility", as defined in Section 124 (e) (1), is the part of the divisible property which has been certified, and the remainder is not an "emergency facility"; in such a situation the amortization deduction under Section 124 (a) is limited to the part which is an "emergency facility"—the remainder of the property being subject to depreciation deductions under Section 23 (l). However, if the entire property has been certified, with the certificate being limited to an indivisible portion of the property or its cost, the entire property is an "emergency facility" under Section 124 (a), but Section 124 (g) specifies how the amortization and depreciation deduction shall be calculated. See also Sec. 29.124-6, Treasury Regulations 111, as amended.

While Section 124 (e) contemplates the certification of a divisible part of property, it is Section 124 (f) which authorizes the issuance of a partial certificate with respect to indivisible property.

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being essentially the same. (R. 50–51.) In this it was entirely correct. If the proposed facility had a capacity in excess of that needed for the national defense, or, for any reason, was to be used only partially for defense production, it would be clear that only part of the taxpayer's cost of acquiring the facility would be devoted to the national defense and, in harmony with the purpose of the statute, it would be proper that only such portion of the cost qualify for the extraordinary deduction afforded by rapid amortization; the rest of the taxpayer's cost, not being necessary to the national defense, would properly be depreciated under Section 23 (l), the same as the cost of any other property. Where, as here, the proposed facility would have a clear post-war use, it is equally plain that only part of the taxpayer's cost would be devoted to the national defense and part would ultimately be devoted to non-defense purposes; and it is equally appropriate in this situation, too, that only part of the cost should qualify for the extraordinary deduction afforded by rapid amortization, with the remainder of the cost being recouped by ordinary depreciation deductions. In short, the statutory grant of authority under Section 124 (f) reposed sufficient discretion in the Board to determine that only part of the cost basis of a particular facility would be necessary in the interest of the national defense and authorized it to issue a certificate under which only that part would qualify for the amortization deduction.

3. The taxpayer (Br. 47–52) seems to argue that the statute must be interpreted in the light of the con-

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 124

NATIONAL LEAD COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (R. 52–55) is reported at 23 T. C. 988. The opinion of the Court of Appeals (R. 57–62) is reported at 230 F. 2d 161.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1956. Taxpayer's petition for rehearing, filed on February 29, 1956, was denied on March 12, 1956. (R. 63–64.) The petition for a writ of certiorari, filed on May 29, 1956, was granted on June 11, 1956. (R. 64.) The jurisdiction of this Court rests upon 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the War Production Board, in issuing necessity certificates for accelerated amortization, had authority to certify only part of the cost of a new facility.

2. Whether the legality of the Board's action in issuing such certificates can be tested many years later by a collateral attack in a Tax Court proceeding, rather than through direct review. Stated otherwise, the question is, assuming the Board had no authority to issue "partial cost" certificates, whether the Tax Court could properly enter a decision as though the taxpayer had received certificates for 100% of the cost of facilities when, in fact, the certificates issued by the Board were for only part of the costs.[1]

STATUTES AND OTHER AUTHORITIES INVOLVED

Pertinent provisions of Sections 23 (t) and 124 (a), (d), (e), (f) and (g) and 124A (e) of the Internal Revenue Code of 1939, of Executive Orders 9406 and 9429, of Sections 1, 2, 3, 5 and 9 of the Regulations and Amended Regulations Governing the Issuance of Necessity Certificates Under Section 124 (f) of the Internal Revenue Code of 1939, and of Section 29.124–6 of Treasury Regulations 111, are set forth in Appendix A to the Brief for the United States in the companion case, No. 78, *United States* v. *Allen-Bradley Co.*

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[1] This question embraces several subsidiary questions which taxpayer states separately as questions 1, 2, 5, 6 and 7 (Br. 2–4) and which are discussed *infra*, pp. 20–26.

STATEMENT

The facts relevant on this review, as stipulated (R. 3–52) and found by the Tax Court (R. 53–54), may be summarized as follows:

The taxpayer, a New Jersey corporation, is one of the principal producers in the United States of alloys and mixed metal products suitable for use in the manufacture of industrial bearings. Since 1935 the taxpayer has had a controlling stock interest in the American Bearing Corporation, a company engaged in the manufacture and sale of industrial bearings. On or about February 8, 1944, the taxpayer purchased the remaining outstanding stock of American Bearing, and on June 30, 1944, caused it to be liquidated. Since that date, the business previously conducted by American Bearing has been carried on by the taxpayer. (R. 4–5.)

Pursuant to Section 124 of the Internal Revenue Code of 1939, permitting accelerated amortization deductions with respect to "emergency facilities", the American Bearing Corporation on February 1, 1944, applied to the War Production Board, the certifying agency at that time, for a certificate of necessity to cover the cost of certain facilities for the production of bronze back, heavy ball bearings for heavy duty diesel and steam engines. (R. 5.) On February 5, 1944, the War Production Board issued the following certificate (R. 5, 8A):

Date _____

NC-1893

UNITED STATES OF AMERICA

WAR PRODUCTION BOARD

NECESSITY CERTIFICATE

To the COMMISSIONER OF INTERNAL REVENUE:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

American Bearing Corporation
429 S. Harding Avenue
Indianapolis, Indiana

It is hereby certified that the facilities described in the attached Appendix A (Consisting of three pages _____) are necessary in the interest of national defense during the emergency period, up to 50% of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, and that the application for this Certificate was filed on February 1, 1944.

WAR PRODUCTION BOARD,
By J. JOSEPH WHELAN,
Recording Secretary.

Feb. 5, 1944.

Subsequently, American Bearing filed another application for a necessity certificate relating to other facilities to be constructed and the taxpayer itself filed two additional applications. In response to these three applications, the War Production Board

issued three more necessity certificates, worded like the first except that the percentage certified in these certificates was 35%. (R. 5–6, 8A–8B.)

All four percentage certificates were issued pursuant to the policy then adopted by the War Production Board to curb further plant expansion by granting necessity certificates only when it would clearly be in the Government's interest that the particular facility be privately financed, and where the facility had clear post-war use, by certifying only that portion of its cost which represented excess war costs. In the ordinary case this cost was considered to be 35%. (R. 9–52.[2])

Having received the necessity certificates in question, taxpayer proceeded to construct and acquire the facilities to which they related. (R. 6–7). In its tax returns taxpayer computed its amortization deductions in accordance with the percentages of cost set forth in these certificates, the remaining cost being treated as subject to ordinary depreciation deductions. When the Commissioner subsequently asserted deficiencies against the taxpayer based on other

[2] The affidavit of Sidney T. Thomas, Chief of the Tax Amortization Branch, Civilian Production Administration, explaining the policy of the War Production Board in these percentage certification cases, was prepared in connection with, and is part of the record in, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (D. D. C.) affirmed *per curiam*, *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904. This affidavit was made a part of the record in the instant case (R. 9–52) and it was stipulated that the affidavit, with its accompanying exhibits, sets forth the reasons for the percentage limitations appearing on the necessity certificates here involved (R. 7).

grounds, taxpayer on November 21, 1951, filed a petition for redetermination by the Tax Court. On April 9, 1954, taxpayer filed an amendment to its petition, contending for the first time that the War Production Board had no authority to certify less than 100% of the cost of the facilities, and that taxpayer was entitled to accelerated amortization deductions with respect to the entire cost of such facilities.[3] (R. 1–2.)

The Tax Court, with Judge Opper dissenting, sustained the taxpayer's contentions. (R. 52–55.) On appeal, the Second Circuit reversed the Tax Court's decision. Pointing out that it was unnecessary to decide whether the statute authorized issuance of certificates for less than 100% of cost (R. 59), the Court of Appeals held that the taxpayer could not, in any event, be allowed the deductions claimed because the War Production Board had discretionary authority to determine what facilities were necessary in the interest of the national defense, that it had not certified 100% of the cost of the facilities as necessary in the interest of national defense, and the Tax Court, having no authority to exercise the discretion entrusted to the War Production Board, could not allow a tax deduction just as though the taxpayer had received certificates for 100% of the cost of the facilities. The court observed that the taxpayer, having accepted the benefits of the percentage certificates and having failed to challenge their validity prior to the Tax

[3] It was stipulated (R. 7) that if a greater amortization deduction were allowed, it should be reduced by the amount of the depreciation deductions which had been taken.

Court proceeding, was bound by the limitations of the certificates which were issued to it. (R. 60–62.)

SUMMARY OF ARGUMENT

I

There are in this case, as in *United States* v. *Allen-Bradley,* No. 78, now pending before this Court, two ultimate questions—(1) whether the War Production Board had statutory authority to issue necessity certificates which did not cover the entire cost of particular facilities, and (2) assuming that the Board lacked such authority, whether the Tax Court could properly allow amortization deductions with respect to the entire cost of the facilities notwithstanding the fact that the Board had determined that only part of such cost was to be covered by necessity certificates. The Tax Court decided both of these questions in favor of the taxpayer. The Court of Appeals decided the second question in favor of the Commissioner, finding it unnecessary, under the circumstances, to reach the first question. Since, for the most part, the Government's position on both of these questions is fully set forth in its brief in *Allen-Bradley,* our discussion here will be limited to answering specific points raised in taxpayer's opening brief.

II

Contending that the War Production Board lacked statutory authority to issue necessity certificates covering only part of the cost of particular facilities, taxpayer argues that the "only so much of" phrase in

Section 124 (f) of the Internal Revenue Code of 1939 was designed merely to limit certification to post-1939 construction costs. At the same time taxpayer apparently assumes that the Regulations validly provided for partial certificates in cases where the size or capacity of the facilities was greater than necessary in the interest of national defense, even though the entire facilities were constructed after December 31, 1939. A conclusion that the Board had discretion to issue a partial certificate in such a situation, however, stands in flat contradiction to the contention that the statute does not permit a partial certificate unless part of the facility was constructed or acquired prior to 1940.

Moreover, not only is there no statutory basis for the distinction which taxpayer would draw, but factually the two situations are also essentially the same. Thus, to the extent that a facility's costs are allocable to post-war, non-defense use, those costs are no more necessary in the interest of national defense than costs allocable to excess capacity attributable to non-defense use during the emergency period.

Taxpayer also seems to argue that, since the statutory amortization provisions were enacted at a time when it was not known whether particular facilities would have post-war utility, Congress could not have intended the Board to take post-war utility into account when issuing necessity certificates. It would, however, be absurd to assume that Congress in enacting the statutory amortization provisions thought that shortages and the emergency would last forever

and that the time would never come when there would be a diminishing need for plant facilities and when the fact of post-war utility could be definitely ascertained.

III

As previously indicated, the Court of Appeals in the instant case held that, even assuming that the War Production Board lacked statutory authority to issue partial certificates, (1) the necessity certificates here involved did not represent an administrative determination that the facilities in question were fully necessary in the interest of national defense, and (2) since the Tax Court had no authority to make that determination, it could not properly allow amortization deductions as though such a determination had been made. In challenging this holding, taxpayer erroneously assumes that the percentage limitations of the necessity certificates involved are entirely separate and distinct from the Board's determination and certification as to the necessity of the facilities in question. But, the announced policy of the executive, the regulations approved by the President, the standards followed by the Board, the instructions issued for the guidance of its personnel and the very terms of the certificates themselves, all conclusively establish that the Board did not make a determination of necessity without regard to the percentage limitations set forth in the certificates. Rather, the uncontradicted facts clearly demonstrate that the Board, taking into consideration the cost of the certification program in lost revenue to the Government, deter-

mined that it would not be in the national interest to issue 100% certificates in the case of facilities having post-war utility, and that it would be in the interest of national defense to have such facilities privately rather than publicly financed only where a partial certificate was issued "based, for example, on excess cost attributable to the war".

Taxpayer's argument that the Tax Court had jurisdiction to review all issues relating to its tax liability is based on a mistaken premise. It assumes that, if the Board did not have statutory authority to issue partial certificates, the taxpayer would automatically be entitled to 100% certificates. But, on the contrary, it would still be up to the Board to determine whether to issue 100% certificates or to issue none, a determination which the Board did not make and which the Tax Court could not make for the Board.

In so holding, the Court of Appeals did not decide this case on the basis of a new issue on appeal. Nor is there any merit to taxpayer's argument that the Court of Appeals disregarded the stipulated facts. Finally, since the stipulated facts fully and clearly disclose the basis upon which the necessity certificates were issued, and since the Tax Court has no authority to amend those certificates or to require them to be amended by the certifying agency, no useful purpose would be served by having the case remanded, as taxpayer suggests.

ARGUMENT

SINCE ONLY PART OF THE COST OF CERTAIN FACILITIES HAD BEEN CERTIFIED AS NECESSARY IN THE INTEREST OF NATIONAL DEFENSE, THE TAXPAYER WAS NOT ENTITLED TO AMORTIZATION DEDUCTIONS WITH RESPECT TO THE ENTIRE COST OF SUCH FACILITIES

A. PRELIMINARY

As taxpayer indicates (Br. 6–7), there are in this case two ultimate questions, both of which are also common to *United States* v. *Allen-Bradley Co.*, No. 78, now pending before this Court, and *Ohio Power Co.* v. *United States*, 129 F. Supp. 215 (C. Cls.), certiorari denied, 350 U. S. 862, rehearing denied, 350 U. S. 919, motion for leave to file second petition for rehearing denied, 351 U. S. 958, order denying petition for rehearing vacated and petition for rehearing continued, 351 U. S. 980. These questions are (1) whether the War Production Board had statutory authority to issue necessity certificates which did not cover the entire cost of particular facilities, and (2) assuming that the Board lacked such authority, whether the Tax Court could properly allow amortization deductions with respect to the entire cost of the facilities notwithstanding the fact that the Board had determined that only part of such cost was to be covered by the necessity certificates. In allowing the amortization deductions claimed, the Tax Court decided both of these questions in favor of the taxpayer. In reversing the decision of the Tax Court, the Court of Appeals decided the second question in favor of the Commissioner, finding it unnecessary, under the circum-

stances, to reach the first question. Since, for the most part, the Government's position on both questions is fully covered in the brief for the United States filed in the *Allen-Bradley* case, *supra*, we will limit our discussion here to answering specific matters raised by the taxpayer which warrant comment.

B. SECTION 124 OF THE INTERNAL REVENUE CODE AUTHORIZED THE ISSUANCE OF PARTIAL CERTIFICATES OF NECESSITY

1. The taxpayer contends that the plain language of Section 124 of the 1939 Code requires the conclusion that the Board had no authority to issue the partial certificates of necessity involved in these cases; it argues that the "only so much of" phrase of Section 124 (f) was designed only to permit certification of the basis of property attributable to construction or acquisition after December 31, 1939, and precluded the Board from issuing the limited certificates which it granted to this and other taxpayers. (Br. 25–52.) We shall not repeat the arguments made in our brief in *Allen-Bradley* (pp. 26–47) which show that not only is there no basis for imputing to Congress an intent to impose such a restriction upon the Board, but that the statutory amortization provisions themselves, the basic underlying congressional purpose, the contemporaneous administrative construction, and all other relevant aids to interpretation support the conclusion that Congress did not prohibit the Board, where it found the facts so required, from certifying part rather than all of the cost of a particular facility.

We do note, however, that the taxpayer tacitly assumes, at least it does not deny, that the Board had authority to issue partial certificates in some circumstances, even though the entire facility was constructed or acquired after December 31, 1939. Where there were "facilities of a size or capacity greater than was necessary in the interest of national defense, or where the facilities certified were to be used only partially for defense production", the taxpayer recognizes that partial certificates were issued, and were contemplated by the applicable, contemporaneous Treasury Regulations. (Br. 46.) But, the taxpayer argues, partial certificates in these situations were different from partial certificates which were designed to preclude amortization of a portion of the costs of facilities which would have a post-war use. (Br. 46–47.)

But, once it is admitted that Section 124 is broad enough to empower the Board to issue some kind of partial certificates, it follows that it had authority to issue partial certificates in any situation, for there is nothing in the statute which draws the distinctions being made by the taxpayer or which authorizes the issuance of partial certificates in some situations and denies it in others. Indeed, the Board's authority to issue a partial certificate in any situation would have to come from the "only so much of" phrase of Section 124 (f). A conclusion that the Board had discretionary authority to issue partial certificates in any situation stands in flat contradiction to the taxpayer's argument that Section 124 (f) granted no discre-

ditions which prevailed in 1940, when the amortization provisions were enacted, and that, since no one then knew (Br. 48) "what the future held", Congress could not have predicted that facilities would have any post-war utility and could not have granted any discretion to the Board ever to take post-war utility into account.

This assumption—that Congress' outlook was so narrow and short-sighted—cannot be accepted. To be sure, during the defense era and the early stages of the war, the emphasis of the legislature and the executive was on the immediate, critical need for a rapid expansion of production facilities. And, as we observed in the *Allen-Bradley* brief (pp. 42–43), at this stage of the development of the nation's war economy, possible post-war utility was remote and contingent, and was undoubtedly a relatively small factor in the over-all problem. But one can scarcely assume that Congress legislated on the premise that there would never be any improvement in plant facility capacity, that there would never come a time when the end of the emergency would be in sight, and that possibilities of post-war use would always be unclear, even with respect to construction taking place in later years when the war drew to its inevitable close. It is more realistic to assume that Congress did not legislate with a static condition in mind, and did anticipate that there would be a diminishing need for new plant facilities in the future and that there would come a time when the possibility of post-war utility would be clear enough to be taken into account in determining whether, and how much,

rapid amortization should be allowed.[5] We should not attribute to Congress, in the absence of evidence, an intent to impose unrealistic and self-defeating restrictions on the Board which would have precluded it, for all time, from doing anything except either to certify the full costs of any facility constructed and acquired after December 31, 1939, or else to deny a certificate altogether. As we have pointed out in the *Allen-Bradley* brief (pp. 26–47) not only is there nothing in the statute or its legislative history to justify the conclusion that such rigidity of administration was intended, but everything points the other way.

C. IN ANY EVENT, SINCE THE BOARD NEVER DETERMINED THAT THE ENTIRE COST OF THE FACILITIES WAS NECESSARY IN THE INTEREST OF THE NATIONAL DEFENSE, THE TAX COURT ERRED IN ALLOWING A TAX DEDUCTION JUST AS THOUGH THE TAXPAYER HAD RECEIVED CERTIFICATES FOR 100% OF THEIR COST

As we have already observed, the Court of Appeals did not find it necessary to decide whether the statute empowered the Board to issue partial certificates of necessity. Instead, its decision rests on the undeniable fact that there never has been a certification that 100% of the cost of the taxpayer's facilities was necessary in the interest of the national defense. Since the Tax Court had no power to make any determination of what was necessary in the interest of the national defense, the Court of Appeals held, correctly we believe, that the Tax Court could not decide the case by granting amortization deductions

[5] Section 124 (d) (1) illustrates that Congress contemplated the possibility that the emergency might be terminated prior to the 5-year amortization period for any particular facility.

on the full amount of the cost of the facilities, just as though the War Production Board had certified 100% of the costs as being necessary in the interest of the national defense, when the Board had never made such a determination.

At the outset, before examining the taxpayer's arguments on this aspect of the case in greater detail, we believe it pertinent to observe that the various contentions being made rest, almost entirely, on a single assumption—an assumption which is demonstrably wrong. The taxpayer's constant assumption (sometimes stated, but for the most part implicit) is that the War Production Board, in issuing the certificates, had made an absolute determination that the facilities, in their entirety, were necessary in the interest of the national defense and that the Board, as a wholly separate and independent matter, having no relation to or bearing on this determination of necessity, had attempted to limit the amount of the amortization deduction because the facilities would have a post-war utility—a limitation which the taxpayer contends was illegal and could be disregarded by the Tax Court as an unauthorized, meaningless, and separable appendage. (See, for example, Pet. Br. 27–30, 52–54.)

But this assumption is completely unwarranted for the stipulated facts make it perfectly plain that the Board did not determine and did not intend to determine that the facilities, as an abstract matter, were necessary in the interest of the national defense; instead, the determination that only a stated percentage of cost was necessary in the interest of the national defense represented an ultimate, indivisible

judgment on the part of those who were empowered to make these decisions. The two elements of the administrators' judgment, far from being separate and distinct, were in fact inseparable and integrally related to each other. Cf. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618–19.

As we have shown in the *Allen-Bradley* brief (pp. 20–25, 52–56), and as is demonstrated by the record in this case (R. 7–52), the announced policy of the executive, the Regulations approved by the President, the standards followed by the Board, the instructions issued for the guidance of its personnel, and the very terms of the certificates, leave no grounds for contending that the War Production Board made a determination of necessity without any regard to the percentage limitations contained in the certificates. The uncontradicted facts, as stipulated by the parties, demonstrate that the Board had made an advance, general determination that, taking into account the cost to the Government, it would not be in the interest of the national defense to issue 100% certificates unless it was reasonable to assume that the facilities would not be useful after the war (R. 50), and had similarly determined that, where possible, it would be in the interest of the national defense that facilities having a post-war use (R. 52) "be publicly rather than privately financed with a 100 percent certificate" and that it would be in the interest of the national defense that such facilities be privately financed only were a partial certificate was issued (R. 52) "based, for example, on excess cost attributable to the war." (See also R. 13–17.)

These and other stipulated, uncontroverted facts make it plain that the taxpayer is in error in assuming that (Br. 29) the "facts found by the administrative agency" represent a finding sufficient to enable the Tax Court to disregard the percentage limitations in the certificates as irrelevant surplusage, and to consider that the Board had determined that it was necessary in the interest of the national defense that the property be acquired by this taxpayer, even if 100% of the cost was required to be recouped by rapid amortization.*

1. The taxpayer's extended argument (Br. 12–22) concerning the jurisdiction of the Tax Court to review all issues relating to its tax liability is without merit. It assumes, erroneously, that if the Board had no statutory authority to issue a partial certificate, the taxpayer would automatically be entitled to a certificate for 100% of its costs. But, as we have shown in *Allen-Bradley* (Br. 50–56), had the Board been properly apprised that it lacked authority to issue partial certificates, it still would have had to exercise discretion in deciding whether to issue certi-

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*The taxpayer (Br. 27–28) points to the fact that the Board had made an advance, general determination that (R. 45–46, 51) "no facility will be certified unless the war effort would actually be weakened by the lack thereof" and seems to contend that the issuance of any kind of certificate necessarily meant that the facilities were necessary in the interest of the national defense. But this overlooks the fact that the Board was expressly concerned with the Government's monetary interest and the alternative possibility of direct government financing of facilities necessary to the war effort. (R. 45, 51.) In other words, a facility could be necessary to the war effort and still not be necessary to the national defense if it had to be privately financed under a 100% certificate.

ficates or to deny them. As the court below observed (R. 61) "If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same."

The Tax Court, even if it was right in concluding that the Board lacked statutory authority to issue partial certificates, had no authority to issue a 100% certificate; it could not make the administrative judgment of necessity; that function was solely entrusted to the Board. Yet, the Tax Court did precisely that when it decided that the taxpayer was entitled to amortization deductions just as though it had received certificates for 100% of the cost of the properties.[7]

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[7] The foregoing, together with the fact that the Tax Court could not even require the Board or its successor in interest to exercise administrative discretion, also demonstrates the fallacy of the taxpayer's contentions (Br. 18–22) that review in the Tax Court represented an adequate remedy which would have precluded it from seeking a direct judicial review by mandamus, injunction, or otherwise (e. g., declaratory judgment) of the validity of the Board's action in issuing partial certificates.

It is also plain that *American Twist Drill Co.* v. *Commissioner*, 11 T. C. 200, and *Arkansas-Oklahoma Gas Co.* v. *Commissioner*, 17 T. C. 1208, reversed, 201 F. 2d 98 (C. A. 8th) (Pet. Br. 13–14), do not lend any strength to the taxpayer's contentions for those cases did not involve any question of the exercise of further discretion by the Board. Indeed, in the *Arkansas-Oklahoma* case, the Court of Appeals, in reversing the Tax Court, expressly recognized (p. 103):

"This determination is not reviewable by the courts. A Necessity Certificate made by the Advisory Counsel and the Secretary of War conclusively determines not only the necessity for the described facility and for the material to be produced by it for the national defense, but also the percentage of cost of acquisition includible in the adjusted basis of the facility for the purpose of amortization."

The court below was altogether correct, therefore, in concluding that (R. 61):

> Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. Cf. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20–21 (1952).

2. The taxpayer contends, however, that the Court of Appeals, in so holding, erroneously undertook to decide an issue which was not raised in the Tax Court (Br. 22–24), and that it did so by disregarding the facts stipulated by the parties and found by the Tax Court (Br. 52–55, 58–60). Further, the taxpayer contends that, at the very least, the Court of Appeals should have remanded the case to the Tax Court (Br. 55) "to afford the taxpayer an opportunity to improve the record, if it could."

(*a*) In holding that the taxpayer was not entitled to an amortization deduction, just as though the Board had issued certificates for 100% of the costs of the property, when in fact it had not done so, the Court of Appeals did not decide a new issue. Whether the taxpayer was entitled to amortize its full cost or only the percentage of cost certified by the Board was the precise issue before the Tax Court. This question was first raised by the taxpayer's amended petition in the Tax Court proceedings (R. 1–2) and was put in issue by the Commissioner's amended answer which

denied that the taxpayer was entitled to amortize the full cost (R. 3). And, further, the Commissioner argued to the Tax Court that it could not grant amortization in excess of the percentage of costs certified by the Board for, otherwise, it would improperly be exercising the discretion entrusted to the Board.[8]

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[8] The Commissioner's brief in the Tax Court stated (pp. 25, 27):

"The Board, in fact, determined that only certain percentages (Stip. 4, 5, 6, 7) of petitioner's total costs of new facilities represented the excess war costs, and there is no evidence before this Court upon which different percentages could possibly be computed, whether or not such computations were within the province of the Court. * * *

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"After careful consideration, the War Production Board concluded in this case that private acquisition and ownership of the additional machinery and equipment needed by petitioner to increase its output during the emergency period was to the advantage of the Government, if only that portion of the total costs which were attributable to excess war costs could be certified for amortization. Otherwise, the Board might well have decided to acquire the facilities outright with Government funds. The effect of the Court's decision, in *Wickes Corp.* v. *United States*, *supra*, is to substitute its judgment for that of the certifying authority, without having the pertinent factual data before it.

"It is respectfully suggested that the Congress did not intend to grant jurisdiction to the courts to substitute their judgment for that of the designated certifying authorities, with respect to the portions of cost properly certifiable for amortization allowances, as "necessary in the interest of national defense during the emergency period." If that power existed in the courts, the constituted certifying agencies would be deprived of their clear duty to consider and determine what parts, if any, of an applicant's new or enlarged facilities, were to the advantage of the Government to have privately financed."

(*b*) The stipulation of facts introduced by the parties includes an excerpt from the record in *Wickes Corp.* v. *United States,* 108 F. Supp. 616 (C. Cls.), which consisted of an affidavit by Sidney T. Thomas, Chief of the Tax Amortization Branch, Civilian Production Administration (R. 9–19), together with exhibits to the affidavit (R. 19–52). The stipulation states that (R. 7) this "excerpt sets forth the reasons for the percentage limitations appearing on the face" of the certificates issued to the taxpayer.

Since, as shown above at p. 19, *supra,* and in the *Allen-Bradley* brief (pp. 20–25, 52–56) these stipulated facts conclusively show what elements of judgment entered into these partial certificates, and demonstrate that the Board did take into account what it would have cost the Government to issue certificates for a larger percentage of cost, and did consider the possible advantages of alternative, direct Government financing, we submit that the taxpayer is mistaken in contending (Br. 52–56, 60) that the stipulated facts were disregarded by the Court of Appeals when it concluded that the Board had never made a determination of necessity which would authorize amortization of 100% of the costs of the property. The situation is precisely opposite to that described by the taxpayer, for it was the Tax Court, not the Court of Appeals, which ignored the clearly stipulated facts.

(*c*) The taxpayer's suggestion that the case ought to have been remanded to afford it (Br. 55) "an opportunity to improve the record, if it could", is, for the most part, based on the assumptions that the Court of Appeals had improperly decided the case

on the basis of an issue not presented to the Tax Court and had also ignored the stipulated facts. Since these assumptions are groundless, there is no basis for the suggestion of a remand. Furthermore, aside from the fact that the taxpayer had a full opportunity to prove the essential facts at the proper time, i. e., when the case was tried in the Tax Court, there is nothing to indicate that the stipulated facts did not fully and completely disclose the basis on which the certificates were issued.* In addition to the fact that the taxpayer does not even suggest what further facts could be proved, orderly procedure precludes a remand at this late stage merely to permit a party to see whether it "could" improve the record.

We also note that the taxpayer (Br. 57) suggests that it might now be possible to have the Secretary of Commerce, the successor to the War Production Board, issue a certificate covering 100% of the costs of these facilities, and that the case ought to be kept open to permit it to make such an attempt. We will not speculate whether the Secretary of Commerce would or would not undertake to re-examine the discretion exercised by his predecessor more than 12 years ago. We need merely observe that the time for the taxpayer to have made its record was before, not

* It is significant that the affidavit and exhibits used in this case were also relied on by the parties to show what was encompassed by these partial certificates in *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (D. D. C.), affirmed *per curiam, sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904; *Wicker Corp.* v. *United States*, 108 F. Supp. 616 (C. Cls.); *Ohio Power Co.* v. *United States*, *supra*; as well as in the *Allen-Bradley case*, *supra*.

after, this case was tried. Indeed, in the petition for rehearing filed with the Court of Appeals on February 29, 1956, the taxpayer, for the first time, had made the suggestion that it be permitted this extraordinary procedure. Significantly, although more than 8 months have since elapsed, the taxpayer still has made no move in this direction.[9]

In its essential aspects, therefore, this case is precisely like *Allen-Bradley*. When the partial certificates were issued, the taxpayer accepted them without challenge. Had it questioned the authority of the Board to issue partial certificates, by instituting prompt and appropriate proceedings in a court of competent jurisdiction, and had it been successful in its contention that the Board lacked statutory authority to issue such certificates, the Board would still have had an opportunity to exercise its discretion and to decide whether 100% certificates should be issued or none at all. The Board might well have decided,

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[9] In view of the nature of the necessity certificates here involved and the governing regulations, it is extremely doubtful whether the Secretary of Commerce as successor to the War Production Board could issue 100% certificates at this time. Thus, Section 4 of the regulations prescribed by the War Production Board, with the approval of the President, provides (8 Fed. Reg. 16965): "The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority *prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.*" [Emphasis added.]
And, where, as here, certificates have been accepted and construction of the facilities completed, there is nothing in the regulations which contemplates that an applicant can secure a revision of the certificates which were issued.

in view of the added cost of full amortization under private financing and in view of the post-war utility which would have redounded to the Government's benefit if the facilities were publicly financed, that it would be in the interest of the national defense to refuse to issue a certificate and to have the Government finance the acquisition.

Neither the Tax Court nor any other tribunal having jurisdiction to determine a taxpayer's correct tax liability can exercise the discretion entrusted to the Board or can determine what certificates would have been issued if the Board's authority had been successfully challenged. Taxpayer's claim to 100% amortization deductions depends on its having 100% certificates. These it does not have, and its claim must fail. In sum the Tax Court was either required to accept the certificates, with their percentage limitations, as conclusive evidence of the tax basis on which the amortization deductions could be computed, or to hold the certificates invalid in their entirety, in which event the taxpayer would be entitled to no amortization deductions. If the Board was empowered to issue these partial certificates, the Tax Court was in error in allowing a larger basis for amortization than was covered by the certificates. Accordingly, under either view of the case, the Court of Appeals was correct in reversing the Tax Court's decision.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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NOVEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956